Supreme Court, U.S.
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No. 96-_____

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1996

FRANKLIN BALLENGER,
Petitioner,

vs.

STATE OF NORTH CAROLINA,
Respondent.

On Petition for a Writ of Certiorari to the
Supreme Court of the State of North Carolina

PETITION FOR A WRIT OF CERTIORARI

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Question Presented for Review

Did the supreme court of North Carolina erroneously hold that a person who has fully paid a tax, penalty and interest imposed by North Carolina for illegal possession of marijuana may nevertheless be criminally prosecuted by North Carolina related to illegal possession of the same marijuana, without violating United States constitutional provisions aimed to prevent attempted double punishment?

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Franklin Ballenger respectfully petitions for a writ of certiorari to review the judgment of the North Carolina Supreme Court in this case.

OPINIONS BELOW

The opinion of the supreme court of North Carolina (Appendix 1A) is reported at __ N.C. __, 481 S.E.2d 84 (1997). The opinion of the court of appeals of North Carolina (Appendix 2A - 15A) is reported at 123 N.C. App. 179, 472 S.E.2d 572 (1996). The opinion of the superior court of Guilford County, North Carolina (Appendix 16A - 17A) is unreported.

JURISDICTION

The supreme court of North Carolina entered its judgment on March 7, 1997. *See* Appendix, 1A. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(a).

CONSTITUTIONAL PROVISION(S) INVOLVED

The Double Jeopardy Clause of the Fifth Amendment provides: "[N]or shall any person be twice put in jeopardy of life or limb. . . ." U.S. Const. Amend. V.

In the event this Court should find the Double Jeopardy Clause inapplicable to criminal prosecutions following civil tax proceedings by the same sovereign which punish, Petitioner Ballenger would invite consideration of whether the Due Process Clause of the Fourteenth Amendment applies to the facts of this case. That clause provides: "[Nor] shall any State deprive any person of life, liberty, or property, without due process of law..." U.S. Const. Amend. XIV, Section 1.

STATEMENT OF THE CASE

On September 15, 1994, Mr. Ballenger, a South Carolina citizen, was arrested in North Carolina as a result of two pounds of marijuana being found in the trunk of the vehicle in which he was traveling. Appendix, 16A. He was charged with felonious possession of marijuana, and possession with intent to sell or deliver marijuana, in violation of N.C.G.S. Section 90-95(a). Appendix, 3A. Pursuant to N.C.G.S. Section 105-113.105 et seq (the North Carolina Controlled Substance Tax), the North Carolina Department of Revenue, after learning of his arrest, served a Certificate of Tax Liability, Notice of Controlled Tax Assessment, and Warrant for Collection of Taxes on Mr. Ballenger, whereby the Department sought taxes, interest, and penalties as a result of Mr. Ballenger's possession of the identical two pounds of marijuana for which he had been criminally arrested and charged. Appendix, 16A.

Under the North Carolina Substance Tax statutes then in force,[1] a "dealer" is defined as a "person who in violation of [N.C.]G.S. 90-95 possesses, delivers, sells or manufactures more than 42.5 grams of marijuana...." N.C.G.S. Section 105-113.106. The Substance Tax statutes authorize taxes at the rate of $3.50 per gram against dealers, as so defined, plus 100% penalty if no tax stamp had been purchased prior to the assessment, plus statutory interest. *See* N.C.G.S. Sections 105-113.107 & -113.110A. The Substance Tax act further provides: "If the dealer does not pay the tax, penalty and interest immediately upon receipt of the notice and demand, the Secretary shall collect the tax, penalty and interest pursuant to the procedure set forth in [N.C.]G.S. 105-241.1(g) for jeopardy assessments or the

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1 The North Carolina Substance Tax has since been amended. *See, e.g.,* Appendix, 10A, 13A.

procedure set forth in [N.C.]G.S. 105-242, including causing execution to be issued immediately against the personal property of the dealer unless the dealer files with the Secretary a bond in the amount of the asserted liability for the tax, penalty and interest. The Secretary shall use all means available to collect the tax, penalty and interest from any property in which the dealer has a legal, equitable or beneficial interest." N.C.G.S. Section 105-113.111.

Mr. Ballenger paid the tax assessment in full, in the amount of $ 3,837.24, including tax, interest, and penalty, on April 19, 1995. *See* Appendix, 17A, 3A. He thereafter moved in the criminal trial court by motion filed on April 24, 1995, to dismiss the criminal charges against him related to possession of marijuana, on the basis that the criminal prosecution would violate the prohibition against successive punishments for the same offense contained in the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution. *See* Appendix, 16A, 3A.

The trial court granted this motion, concluding that the North Carolina drug tax statute is substantially similar to the Montana statute which this Court held constituted double jeopardy punishment in *Department of Rev. v. Kurth Ranch*, 511 U.S. 767 (1994), and that to allow criminal prosecution when Mr. Ballenger had already been punished under the Substance Tax statutes would violate his rights under the Fifth Amendment of the United States Constitution. *See* Appendix, 17A.

On appeal, the court of appeals of North Carolina, by a divided panel, reversed. *See* Appendix, 2A-15A. Mr. Ballenger appealed to the supreme court of North Carolina, continuing to press the arguments he had made in the trial court and at the intermediate level, that the assessment he had paid under the Substance Tax statutes constituted punishment, and that further criminal prosecution therefore was barred by the United States Constitution. On March 7, 1997, the supreme court of North Carolina affirmed the

decision of the court of appeals, per curiam, without opinion. *See* Appendix 1A.

REASONS FOR GRANTING THE PETITION

I. This Court should grant certiorari to resolve the currently existing conflicts among hopelessly split state courts as to whether double jeopardy protections attach in drug tax situations not identical to *Kurth Ranch*'s facts.

A. Previous summary dispositions have not resolved the confusion.

This Court has summarily vacated and remanded four drug tax decisions since deciding *Department of Rev. v. Kurth Ranch*, 511 U.S. 767 (1994) (imposition of Montana drug tax violates double jeopardy where defendants were previously criminally punished). See *Covelli v. Allen*, ___ U.S. ___, 116 S. Ct. 2577 (1996) (vacating and remanding *Covelli v. Commissioner*, 668 A. 2d 699 (Conn. 1995) for further consideration in light of *United States v. Ursery*, ___ U.S. ___, 116 S.Ct. 2135 (1996)), *affirmed without additional analysis, Covelli v. Commissioner*, 683 A.2d 737 (Conn. 1996) (Connecticut court reaffirming its vacated opinion that drug tax is not punishment for double jeopardy purposes, on rationale that tax did not possess identical characteristics of tax involved in *Kurth Ranch*), *petition for certiorari currently pending before this Court*, No. 96- 7869; *Nevada v. Desimone*, ___ U.S. ___, 116 S. Ct. 2576 (1996) (vacating and remanding *Desimone v. State*, 904 P.2d 1 (Nevada 1995), *no opinion on remand rendered as of time this petition for certiorari was filed* (prior vacated opinion had reasoned that drug tax which was not solely remedial must be counted punishment for double jeopardy purposes); *Ward v. Texas*, 513 U.S. 1011 (1994) (vacating and remanding *Ward v. State*, 870 S.W.2d 659 (Tex. App.1994),

opinion on remand: *Ward v. State*, 915 S.W.2d 941 (Tex. App.1996) (intermediate appellate court deciding that Texas drug tax was functional equivalent of second criminal prosecution for same offense, and concluding that differences between Texas tax and tax involved in *Kurth Ranch* were not of constitutional significance); *Stennett v. Texas*, 513 U.S. 922 (1994) (vacating and remanding unpublished opinion, *Stennett v. State*, No. 14-93-00303-CR, 1993 Tex. App. LEXIS 3025 (Tex. App.--Houston [14th Dist.], Nov. 10, 1993, pet. ref'd), *opinion on remand*: *Stennett v. State*, 905 S.W.2d 612 (Tex. App. 1995) (intermediate appellate court reasoning similarly to *Ward v. State*, 915 S.W.2d 941, *supra*), *aff'd* 941 S.W.2d 914 (Tex. Crim. App.1996) (Texas' highest criminal appellate court concluding that, despite lack of identity to tax involved in *Kurth Ranch*, legislative history of tax indicated punitive purpose, requiring that tax be considered double jeopardy punishment).

As the immediately preceding descriptions of results on remand indicate, even in the cases thus specifically directed by this Court to the state courts for further reconsideration in light of controlling precedent, there is no agreement as to what controlling U.S. Supreme Court precedent means or requires. The Connecticut supreme court ignored this Court's *Ursery* decision and merely reinstituted its prior opinion that had argued no double jeopardy violation can occur absent the exact circumstances as were present in *Kurth Ranch*. The Texas intermediate appellate courts, on the other hand, read *Kurth Ranch* to require invalidation of criminal prosecutions arising out of the same incidents as tax assessments, despite factual differences in Texas' drug tax statute from the statute involved in *Kurth Ranch*. Texas' highest criminal appellate court tried to avoid having to resolve the conflicting lower court readings of *Kurth Ranch* by attempting to ground its decision on legislative history indicating punitive intent. Who knows what the Nevada decision on remand in *Desimone* will yield.

If there was ever hope that the lower courts could consistently resolve issues surrounding when drug taxes should be counted double jeopardy punishment, that hope has been belied in the very decisions this Court sent below with instructions to reconsider in light of controlling precedent. As the next section demonstrates, the division among lower courts on double jeopardy drug tax issues is widespread and significant.

B. The decision below[2] directly conflicts with the decisions of the highest courts of at least two other jurisdictions, and is an example of erroneous interpretation of double jeopardy requirements.

The decision below is an example of the "identity" approach which has been adopted by several courts in relation to drug taxes post-*Kurth Ranch*. *See also Milner v. State*, 658 So. 2d 500 (Ala. Civ. App. 1994); *Covelli, supra* (Connecticut); *State v. Lange*, 531 N.W.2d 108 (Iowa 1995); *State v. Gulledge*, 896 P. 2d (Kan. 1995); *McMullin v. South Carolina Dept. of Rev.*, 469 S.E.2d 600 (S.C. 1996). The court below, similar to other courts which have adopted this approach, reasoned that the double jeopardy protections provided by *Kurth Ranch* occur only if the exact same fact pattern as was present in that case also occurred on the facts before it. These courts, as did the two judge panel at the court of appeals level below, claim that the drug tax statute being challenged must require *on its face* both an arrest prior to tax assessment and must also deprive the "owner" of the property being taxed by the time of the assessment.

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2 Since the North Carolina supreme court affirmed unanimously without opinion the decision of the North Carolina court of appeals, all references to arguments of the court below are to the arguments made by the majority in the North Carolina intermediate appellate decision.

Otherwise, these courts claim, there can be no double jeopardy violation, since the facts are not identical to *Kurth Ranch's*. *See State v. Ballenger*, 472 S.E.2d 572, 574-75 (N.C. App. 1996), Appendix at 7A-8A ; *see also, e.g., Covelli*, 668 A.2d at 705-06.

Petitioner respectfully submits that such an "identity" approach trivializes the *Kurth Ranch* holding. While *Ursery* does emphasize that only the clearest evidence of punitive effect in a civil penalty will trigger double jeopardy protections, surely the *Halper* (*United States v. Halper*, 490 U.S. 435 (1989)) and *Kurth Ranch* cases stand for more than that only their *exact* facts will trigger a double jeopardy claim. As the dissenting judge, in the court of appeals decision below noted, "In its Kurth Ranch opinion, the United States Supreme court did not hold that in order to find a tax violative of the double Jeopardy Clause, the tax must contain each of the punishment aspects in the Montana Dangerous Drug Tax. Rather, the Court held that 'taken as a whole, [the Montana] drug tax is a concoction of anomalies, too far-removed in crucial respects from a standard tax assessment to escape characterization as punishment for the purpose of Double Jeopardy analysis.'" *See* Appendix at 10A, 472 S.E.2d at 575 (Smith, J., dissenting, and citing 114 S.Ct at 1948 [511 U.S. at 783]). *See also, e.g., Covelli*, 668 A.2d at 707-08 (Katz, J., dissenting); *Bryant v. State*, 660 N.E.2d 290, 295-97 (Ind. 1995), *cert. denied*, ___ U.S. ___, 117 S. Ct. 293 (1996). This Court should clarify that identity of *Kurth Ranch* factual elements is not required before any double jeopardy protections will attach, so long as the drug tax possesses clearly punitive aspects.

Even in the unlikely event that this Court meant in *Kurth Ranch* that drug taxes only violate double jeopardy if imposed in connection with criminal arrest and if assessed against property which the "holder" can not legally keep, Petitioner Ballenger nevertheless respectfully submits that such requirements should be evaluated on the actual facts of

the case, rather than theoretically. The court below examined the words of the statute in isolation from what occurred in the case, focusing on what the taxing agency *might* have done under the statute, rather than on what actually occurred. *See* Appendix at 7A-8A, 472 S.E.2d at 574-75. *See also, e.g.*, *Covelli*, 668 A.2d at 705-06. Such an approach converts real double jeopardy violations into theoretical (and allegedly non-existent) non-punishment.

Several courts have recognized the fallacy in this reasoning, and have found statutes which actually impose double punishment unconstitutional when so applied. *See, e.g.*, *Bryant*, *supra*; *Ward*, 915 S.W.2d at 944-45; *cf. also Wilson v. Department of Revenue*, 662 N.E.2d 415, 419-20 (Ill. 1996) (indicating that it is impossible to determine at the time of assessment whether the person taxed is illegally possessing the controlled substance without a determination in parallel criminal proceedings of this issue). If, as occurred below to Mr. Ballenger on the actual facts of his case, a defendant is deprived of taxed property and assessed a drug "tax" only when a criminal prosecution is also in the works, this deprivation of "taxed" property and this imposition of tax only in connection with a parallel criminal prosecution are the *same* facts which most clearly demonstrated to this Court in *Kurth Ranch* the double punishment aspects of the drug tax there invalidated. This Court should clarify that a real double punishment situation can not be protected from double jeopardy invalidation by contentions that the statute *theoretically* could have been used in a different manner.

As indicated by previous citations, the highest courts of at least two states have rejected the "identity" approach adopted by the court below. See *Wilson*, *supra* (Illinois); *Clifft v. Indiana Dep't of State Revenue*, 660 N.E.2d 310 (Ind. 1995); *Bryant*, *supra* (extending the analysis of *Clifft* to determine that jeopardy attaches to civil proceeding at time of tax assessment); *see also Fassinger v. Indiana*, 666 N.E.2d 58 (Ind. 1996) (applying *Bryant* to require that

criminal prosecution be dismissed where defendant had already been assessed tax on same drugs); *State v. Mohler*, ___ N.E. 2d ___ (Ind. App. 1997), No. 87A01-9605-PC-163, 1997 Ind. App. LEXIS 495, April 30, 1997, Filed (applying *Bryant* retroactively to pending Indiana appeals).

The decision below additionally squarely conflicts with what appears to be the current decisional law from another two jurisdictions. *State v. Wilson*, No. CR95-02094-FE (Northwest Phoenix Justice Court, decided November 1, 1995) (dismissing count of marijuana possession based on finding that license fee previously paid served only punitive purposes and therefore constituted jeopardy for subsequent double jeopardy purposes);[3] *Commonwealth v. Bird*, No. 95-CR-1044 (Fayette County, Kentucky) (dismissing criminal indictment because civil drug tax had been paid, and rejecting claims that differences in Kentucky drug tax statute from statute involved in Kurth Ranch were constitutionally significant), *currently on appeal before the Kentucky Court of Appeals*, No. 96-CA-0666.[4] *Cf. also New Mexico*

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[3] This case generated significant national coverage during 1996. *See, e.g.*, James Sterngold, *Turned On by Politics; Meet Arizona's Happiest Taxpayers*, Section 4 Page 1 Column 2, The New York Times, October 6, 1996. *Cf. also* Jodie Snyder, *Pot Group Would Sell to Patients: Offers to Fill in for Pharmacies*, The Arizona Republic, Pg. A1 November 9, 1996 (indicating that the *Wilson* case was still pending on appeal and that other similar cases may exist in Arizona). Petitioner was unable to confirm the existence of any additional case law in Arizona on this case at the time of the filing of this Petition.

[4]The co-counsel on the instant Petition, Professor Cox, gave co-authoring assistance on the Appellate Brief for Mr. Bird in this Kentucky case, and has been informed by counsel for Mr. Bird that as of May 30, 1997, no oral

Taxation & Rev. Dept. v. Whitener, 869 P.2d 829 (N.M. App. 1993) (finding drug tax double jeopardy punishment under *Halper* analysis, pre- *Kurth Ranch*).

The decision below also runs contrary to at least part of the logic of final holdings from another two jurisdictions. *See People v. Maurello*, 932 P.2d 851 (Co. App. 1997), (distinguishing former Colorado drug tax statute from that involved below because of lack of anonymity features in Colorado statute, but also further rejecting the requirement of complete identity with *Kurth Ranch* statute, finding the reasoning of courts requiring complete identity unpersuasive); *Sims v. State Tax Comm'n*, 841 P.2d 6, 15 (Utah 1992) (determining in a *non*-double jeopardy context, that a tax stamp proceeding is quasi-criminal and therefore requires application of the exclusionary rule); cf. *Stennett*, *supra* (Texas' highest criminal court finding Texas drug tax statute unconstitutional because of legislative history indicating punitive intent).

Regardless of what might later happen in any jurisdictions where there has not yet been a decision by the state's highest appellate court, the conflict between the decision below with the decisions of the highest courts of Illinois and Indiana will remain real and final on the issue of whether "identity" with *Kurth Ranch* facts is required before double jeopardy protections can attach.

The number of reported and unreported decisions from multiple jurisdictions going in opposite directions on this issue also indicates that the problem of determining whether double jeopardy attaches in drug tax situations is widespread. Drug tax laws from still more states are likely to be challenged in the future, given the quondam success of court challenges in other jurisdictions. *See, e.g.*, Christopher Paul Sorrow, Note, *The New Al Capone Laws and the*

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argument had yet been scheduled in this case nor any decision yet rendered.

Double Jeopardy Implications of Taxing Illegal Drugs, 4 S. Cal. Interdis. L.J. 323, 323 & n.1 (1995) (collecting statutes from at least twenty-six jurisdictions). *Cf. also, e.g., Hill v. State*, 898 P. 2d 155 (Okl. Cr. 1995) (finding defendant had no standing to raise double jeopardy issue since no second criminal proceeding had been instituted, but addressing, under *Ward-Kennedy* test, whether tax penalty was really a disguised criminal sanction and concluding it was not) *with Sims*, *supra* (Utah court holding, in context also of single proceeding, that tax stamp proceedings are quasi criminal because of punishment imposed therein). Appellate tribunals deciding the inevitable future cases that will arise need clear guidance from this Court on which of the mutually inconsistent approaches currently being offered by the lower courts correctly interprets the Constitution. Because of the real and unresolved conflicts on the important issue of whether double jeopardy protections attach in drug tax situations which are not identical to *Kurth Ranch*'s facts, this Court should grant certiorari.

C. This case may additionally provide the opportunity to resolve other important issues, some of first impression for this Court, involving civil-criminal penalties sought to be imposed for the same conduct.

1. Order of proceedings.

The instant case, unlike both *Halper* and *Kurth Ranch*, involves a civil penalty imposed *before* the attempted criminal prosecution. The issue of whether double jeopardy protections attach in such situations, to prevent a criminal prosecution, has never been squarely addressed by this Court. Such a fact situation was involved in *Ursery*, but since this Court in that case determined that civil forfeitures could not constitute punishment for double jeopardy purposes, this Court did not in that case address the government's order-of-proceedings arguments. A civil penalty first, followed by

attempted criminal prosecution, *is* involved in the *Hudson* case, for which this Court granted certiorari earlier this spring. *See Hudson v. United States*, ___U.S.___, 117 S.Ct. 1425 (1997) (granting certiorari on April 14, 1997 on *United States v. Hudson*, 92 F.3d 1026 (10th Cir. 1996) (civil fine and prohibition from further banking activities held to be remedial under *Halper* criteria and therefore held not to foreclose further criminal prosecution)). In the event, however, that this Court should rule in *Hudson* that the civil penalty there imposed was remedial rather than punishment for double jeopardy purposes, the issue of whether order of proceedings has constitutional significance will again be left open.

Assuming that the argument has not been waived by the state of North Carolina's failure to raise it below, it is certainly possible that the state, in opposition to Petitioner Ballenger's argument on the merits, might contend that there can be no double jeopardy violation until and unless there has first been a criminal proceeding to which jeopardy unambiguously has attached. Such argument was made by the government in *Ursery*. Alternatively or additionally, the state may argue that there can be no violation of the multiple punishments prong of double jeopardy until and unless a criminal punishment has actually been ordered as a result of the second proceeding. Justice Scalia has already noted that "if there is a constitutional prohibition on multiple punishments, the order of punishment cannot possibly make any difference." 511 U.S. at 804 (Scalia, J., dissenting). Petitioner agrees. However, as the careful wording of Justice Scalia's dissent indicates, there could arguably be a difference between multiple attempted *prosecutions* which seek to punish and multiple *punishments* actually ordered. Petitioner is prepared to argue that the principles of *Abney v. United States*, 431 U.S. 651 (1977) foreclose criminal prosecution at least in those situations where a punitive civil penalty has been fully paid, as in the case at bar, if a criminal

prosecution for the same offense is thereafter attempted. The issue of whether such prosecutions are foreclosed is a significant one, which this Court has not previously directly addressed.

2. Same offense.

Some lower courts alternatively have attempted to distinguish their drug tax situations from the drug tax declared unconstitutional in *Kurth Ranch* by arguing that the drug tax prosecution was for a different *Blockburger* offense than the related criminal prosecution. *See State v. Jensen*, 915 P.2d 109, 120 (Kan. 1996); *State v. Stubblefield*, 543 N.W.2d 743 (Neb. 1996). *See generally Blockburger v. United States*, 284 U.S. 299 (1932). The issue of whether the *Blockburger* test applies to civil - criminal double jeopardy situations has apparently not been addressed by this Court.

In the *Ursery* case, this Court found it unnecessary to reach same offense issues, ruling instead that civil forfeiture could not constitute double jeopardy punishment. In *Halper*, too, same offense issues were not addressed, presumably because the government in *Halper* had sought summary judgment on the civil claim, arguing that the exact same elements necessary to prove the civil violation had already been established in Mr. Halper's criminal prosecution. *See* 490 U.S. at 437. The failure to address same offense issues in *Kurth Ranch*, however, has troubled some commentators, since arguably the *Kurth Ranch* defendants did *not* all commit the same *Blockburger* offense for which they were assessed drug tax punishment. *Cf.* Akhil Reed Amar, *Essay: Double Jeopardy Law Made Simple*, 106 Yale L.J. 1807, 1833-34 (1997) *with* Amy D. Ronner, Prometheus Unbound: *Accepting a Mythless Concept of Civil In Rem Forfeiture With Double Jeopardy Protection*, 44 Buffalo L. Rev. 655, 742-52 (1996) *and* Christian D. Stewart, Note, *Double Jeopardy — State Drug Tax Statutes Go Up in Smoke:*

Department of Revenue v. Kurth Ranch, 74 Neb. L. Rev. 221, 238-39 (1995). The *Kurth Ranch* Court's failure to address *Blockburger* issues led the trial judge in the *Covelli* case, involving a drug tax situation similar to that below, to conclude that *Kurth Ranch*'s approach is inconsistent with *Blockburger* analysis and therefore should not be applied in the drug tax context. *See Covelli v. Crystal*, No. 534178, 1994 Conn. Super. LEXIS 3276 (Conn. Super. Tax Dec. 21, 1994), *rev'd Covelli v. Commissioner*, 668 A. 2d 699 (Conn. 1995), *vacated and remanded sub nom Covelli v. Allen*, ___ U.S. ___, 116 S. Ct. 2577 (1996), *appellate opinion reinstated, Covelli v. Commissioner*, 683 A.2d 737 (Conn. 1996).

Assuming that the state of North Carolina has not waived the ability to make the argument by failing to raise it below, the state might be expected to argue that the Mr. Ballenger's tax penalty was not for the same offense as the criminal prosecution now being attempted against him. Petitioner respectfully submits that in the case at bar, as in almost all other situations where both a drug tax and a criminal penalty has been sought, the drug tax offense subsumes the criminal offense as a lesser included offense, and therefore would satisfy *Blockburger* conditions, if *Blockburger* were held to apply in such contexts. This is so since the drug statute assesses against property only when the "owner" *illegally* is involved with it. *See* N.C.G.S. Section 105-113.106 (defining dealer as one "who *in violation* of G.S. 90-95 posesses, delivers,...") (emphasis added). In such situations, it would not avail the state, for example, to argue that different *mens rea* is required for the criminal and civil violations, for the intent of the civil statute is to sweep broadly and vaguely almost any and all sorts of illegal connection with the controlled substance into its purview. *Cf.* Ronner, *supra*, 44 Buffalo L.Rev.

Petitioner is prepared to argue additionally, however, that, in the context of attempted punishments across civil and

criminal contexts, more than *Blockburger* may be required. As this Court reemphasized in *Halper*, a civil proceeding is not protected from potential double jeopardy scrutiny even in situations where the legislature clearly intended that it be so protected. Instead, the reviewing court is required to make an independent judicial assessment of whether punishment is really taking place. Such independent assessment is required, despite any legislative labels of remedial or civil purpose designed to protect against double jeopardy invalidation. To *not* independently examine would eviscerate constitutional protections by allowing legislative labeling to trump constitutional protections. Only a singularly unintelligent legislature would fail to label so as to insulate its civil punishments from double jeopardy review.

The *Halper* Court looked behind legislative intent to determine whether punishment, in the plain meaning of the word, was being inflicted, despite what the legislature said it was doing. *See* 490 U.S. at 448 ("punishment, as we commonly understand it").[5] Accordingly, Petitioner Ballenger specifically rejects any arguments that the legislature's intent in passing both a civil and a criminal statute with different words indicates that prosecutions for separate offenses have thereby been authorized. *Cf.* N.C.G.S.

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[5] This Court had formerly done this in the context of determining whether an *entire* proceeding should be considered criminal for purposes of criminal constitutional protections. *See, e.g.*, United States v. Ward, 448 U.S. 242 (1980). What *Halper* seemed to emphasize was that determinations regarding the reality of punishment could be made apart from considering whether a whole proceeding should be considered criminal for purposes of other constitutional protections. In other words, the no double punishments protections provisions of the double jeopardy clause are not limited to punishments inflicted only in criminal proceedings.

Section 105-113.105 (indicating that '[n]othing in this Article may in any manner provide immunity from criminal prosecution"). Such arguments have been rejected by this Court's approach in both *Halper* and in *Kurth Ranch* to the facts before it.

Petitioner further respectfully submits that when independent judicial review is conducted in connection with same offense analysis applied to civil punishments, *Blockburger* would not be the appropriate test. If a civil punishment clearly constitutes *Halper* punishment, merely requiring something different in the civil statute from what is in the criminal statute may inadequately protect against the reality of double jeopardy punishment truly being inflicted for the same conduct. Civil prosecutions are different from criminal proceedings. In purely criminal dual prosecutions, the state's burden of proof is at the absolute highest for both prosecutions. This, plus other constitutional protections to the criminal defendant, may adequately safeguard against potential unfairness in allowing two criminal prosecutions arising out of the same incident.

On the other hand, in a civil prosecution, the state may need to prove relatively little to obtain a punishment which nevertheless clearly is punishment in *Halper* terms. In tax situations, in fact, the presumption is almost always that the government has correctly determined the facts for which penalty is sought. It is the taxpayer who generally must demonstrate that the government's factual assertions are in error. *See, e.g., Welch v. Helvering*, 290 U.S. 111 (1933) (establishing such rule for federal tax prosecutions). This means that the state in a civil proceeding attempted in tandem with a criminal prosecution may attempt to "squeeze" the defendant in a way that would not be possible in apurely criminal context. Cf. N.C.G.S. Section 105-113.111 (allowing Secretary to use any and all means to collect tax, penalty and interest, including execution against unrelated defendant personal property).

Given these differences in civil and criminal prosecutions, a conduct oriented approach to same offense analysis across civil and criminal contexts would be preferable to the *Blockburger* analysis which is used in the purely criminal context. This important issue of how to determine whether a civil drug tax punishment is for the same offense as a criminal drug charge should be addressed by this Court at some point, and the approach of courts like *Jensen* and *Stubblefield* rejected.

3. Legislative intent.

At the intermediate appellate level below, the majority and dissent sharply disagreed about how legislative history should impact on double jeopardy analysis. *Compare* Appendix at 8A-9A *with id.* at 12A-13A, 472 S.E.2d at 575 *with id.* at 576-77. This Court previously has rejected the argument that a legislative pronouncement of *non*-punitive purpose is binding as to the reality of what the statute does. *See, e.g.*, 490 U.S. at 447-48. Accordingly, this Court should reconfirm that the legislature's express desire to authorize a civil enforcement proceeding cannot immunize that proceeding from independent judicial analysis as to whether the punishment authorized would violate *Halper*'s or *Kurth Ranch*'s double jeopardy requirements.

Conclusion to Part I:

The current split among lower courts over *Kurth Ranch*'s implications is intolerable. This is so, not primarily as a matter of abstract legal logic, but at a very practical human level. Given the current divisions among lower courts, Petitioner Ballenger submits that numerous individuals like himself are being unconstitutionally punished, while similarly situated individuals in other states are experiencing the freedom from governmental double jeopardy punishment which the Constitution is designed to provide. On the other hand, if Petitioner is wrong on the

merits of his double jeopardy argument, law enforcement officials, in the states which have ruled opposite to the court below, are being deprived of an important enforcement tool in their war against drug crimes. Either way, the states need this Court to clarify what they may or may not do in their drug tax civil enforcement proceedings. Accordingly, certiorari should be granted in this case to resolve the splits on drug tax issues among the state courts.

II. This Court may additionally wish to grant certiorari in this case to clarify, reformulate or modify rationales supporting *Kurth Ranch* and/or *Halper*.

It is not clear to lower courts from this Court's previous precedents how civil-criminal double jeopardy issues should be resolved. This Court's grant of certiorari in the *Hudson* case is one indication of the need for additional clarification of *Halper*'s requirements. The split among state courts on drug tax issues identified in Part I of this Petition indicates similar need for additional clarification of *Kurth Ranch* and/or of *Halper*'s message as applied to *Kurth Ranch*. Regardless of what this Court may rule in *Hudson*, there will be need for further clarification of how to apply *Kurth Ranch* to drug tax situations not identical to *Kurth Ranch*'s facts. This is so because *Kurth Ranch* itself distinguished the test appropriate for tax situations from that required in *Halper* fine situations. *See* 511 U.S. at 784.

Additionally, despite this Court's dicta in *Ursery* regarding what *Halper* and *Kurth Ranch* mean, lower courts have not applied any new *Ursery* message to drug tax situations. *See, e.g.*, *Maurello*, *supra* (not citing or analyzing *Ursery* in 1997 drug tax opinion); *Covelli*, 683 A.2d at 737 (not citing or analyzing *Ursery* in its opinion on remand); *Mohler*, *supra* (not citing or analyzing *Ursery* in 1997 drug tax opinion). Lower courts, as did the court below, assume

that *Kurth Ranch* alone dictates the proper double jeopardy criteria for drug tax situations.

If this Court meant in *Ursery* to send any new clarification regarding how *Kurth Ranch* should be applied, it will need more explicitly to state what was intended. Petitioner is prepared to concede that this Court in *Ursery* re-read *Halper*'s language to emphasize that only the clearest indications of punitive effect will trigger *Halper* and *Kurth Ranch* type protections. Petitioner would prefer that this Court in *Ursery* have placed a different gloss on *Halper* and on *Austin v. United States*, 509 U.S. 602 (1993), for double jeopardy jurisprudence. Petitioner believes an approach different from the *Ursery dicta* was in fact still being used by members of this Court in the same term in which *Ursery* was decided. See *Bennis v. Michigan*, ___ U.S. ___, 116 S. Ct. 994, 1006-07 & n.10 (1996) (Stevens, J., joined by Souter and Breyer, JJ., dissenting). Petitioner may ask this Court to clarify its *Ursery dicta* more in line with what it has said in other post-*Halper* contexts. Petitioner nevertheless is also prepared to strongly argue that even under the presumption of non-punishment which this Court seems to have set forth in its *Ursery dicta*, the drug tax at issue here, like other similar state drug taxes, qualifies as punishment. The point is that *Ursery* did not overrule or modify any of what was said in *Kurth Ranch*. Under *Kurth Ranch*, even as glossed by *Ursery*, a drug tax which cannot fairly be said to serve revenue raising functions, and which is aimed only at those who illegally possess controlled substances, is a tax which inflicts punishment for double jeopardy purposes.

Two members of this Court are of course on record as desiring that *Halper* (and *Kurth Ranch*) be overruled. *See, e.g.*, 511 U.S. at 804-08 (Scalia, J., joined by Thomas, J., dissenting). The *Kurth Ranch* decision itself was a one vote majority opinion for the Court. Petitioner believes that this Court would not intend to overrule *Halper* or *Kurth Ranch sub rosa*. Petitioner therefore does not read *Ursery* as

negating any of the truths of *Halper* or of *Kurth Ranch*. Petitioner is nevertheless prepared to argue that *Halper* and *Kurth Ranch should* remain good law, in the event this Court wishes to reconsider either or both of those prior opinions in connection with the grant of this petition for certiorari.

On the issue of whether *Halper* or *Kurth Ranch* should be overruled, several academic commentators have criticized this Court's recent double jeopardy approach. The most modest criticism has been that the Court did not provide sufficient guidance to drug situations in *Kurth Ranch*. *See, e.g*, Stewart, *supra*, 74 Neb. L. Rev. 221. Other commentators have argued that the approach in *Halper* is more fundamentally flawed and should be abandoned or restructured around other constitutional doctrines. *See, e.g*, Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 Colum. L. Rev. 1 (1995) (suggesting due process as the vehicle for addressing *Halper* type claims); Amar, *supra*, 106 Yale L.J 1807 (similar); Nancy J. King, *Portioning Punishment: Constitutional Limits on Successive and Excessive Penalties*, 144 U. Pa. L. Rev. 101 (1996) (suggesting a reconstituted eighth amendment analysis); Sorrow, *supra*, 4 S. Cal. Interdis. L.J. 323 (arguing that there are no protections in the double jeopardy clause for civil prosecutions and that *Halper* and *Kurth Ranch* therefore should be abandoned); *cf.* George C. Thomas, III, *A Blameworthy Act Approach to the Double Jeopardy Same Offense Problem*, 83 Cal. L. Rev. 1027 (1995) (indicating that clear legislative intent to punish both civilly and criminally should overcome double jeopardy problems).

Petitioner stands ready to defend this Court's holdings in *Halper* and *Kurth Ranch*, and is prepared to argue that the Double Jeopardy clause is indeed the proper vehicle for defending against punishments imposed through civil proceedings. Moreover, Petitioner is prepared to argue that even if the multiple punishments prong of double

jeopardy analysis were eliminated, as two Justices of this Court and some commentators have urged, the Double Jeopardy clause would nevertheless remain the proper vehicle for providing protection against the *risk* of punishment imposed through successive civil and criminal prosecutions which both are found to be designed to impose punishment. *Cf.* Stanley E. Cox, *Halper's Continuing Double Jeopardy Implications: A Thorn By Any Other Name Would Prick As Deep*, 39 St. Louis L.J. 1235, 1251-67 (1995). Finally, should this Court choose to abandon completely any protections through the Double Jeopardy clause for punishment in civil proceedings, Petitioner is prepared to argue that other constitutional provisions, such as the due process clause, should be construed to protect against the abuse of the same government imposing two punishments for the same offense across civil and criminal proceedings.

The confusions regarding how *Halper* and *Kurth Ranch* issues should be addressed, especially in the drug tax context, will not be resolved short of a grant of certiorari in this or a similar drug tax case. Given *Ursery*'s non-impact on lower court *Kurth Ranch* analysis, Petitioner respectfully suggests that, unless this Court in *Hudson* overrules *Halper* and/or *Kurth Ranch* (which of course Petitioner does not advocate nor understand any party to that case to be advocating), the *Hudson* case is unlikely to resolve the current splits below about whether drug taxes violate the Double Jeopardy clause.

A drug tax case such as the one for which Petitioner seeks certiorari would be the proper vehicle to resolve double jeopardy confusion. *Kurth Ranch* is the only case in which this Court has invalidated a civil penalty under the Double Jeopardy clause. In *Halper* this Court only remanded for additional determination, after announcing as its holding the *possibility* of double jeopardy violation. It is perhaps therefore no surprise that lower courts view *Kurth Ranch* as *the* controlling statement regarding *Halper*'s implications.

This Court therefore may wish, through a grant of certiorari, to clarify *Halper*'s meaning through renewed examination of *Kurth Ranch*'s implications.

CONCLUSION

For all the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

STATE OF NORTH CAROLINA
v.
FRANKLIN BALLENGER

No. 352A96

SUPREME COURT OF NORTH CAROLINA

___ NC ___; 481 S.E.2d 84

February 11, 1997, Heard in the Supreme Court
March 7, 1997, Filed

PRIOR HISTORY: Appeal by defendant pursuant to N.C.G.S. Section 7A-30(2) of the decision of a divided panel of the Court of Appeals, 123 N.C. App. 179, 472 S.E.2d 572 (1996), reversing an order dismissing the charges against defendant entered by Eagles, J., on 5 May 1995, in Superior Court, Guilford County.

DISPOSITION: AFFIRMED.

COUNSEL: Michael F. Easley, Attorney General, by Christopher E. Allen, Assistant Attorney General, for the State.

James H. Price, III, P.A., by James H. Price, III, for defendant-appellant. American Civil Liberties Union of North Carolina Legal Foundation, by Deborah K. Ross, amicus curiae.

OPINION: PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA
v.
FRANKLIN BALLENGER

No. COA95-847

COURT OF APPEALS OF NORTH CAROLINA

123 N.C. App. 179; 472 S.E.2d 572

April 15, 1996, Heard In The Court Of Appeals
July 16, 1996, Filed

PRIOR HISTORY: Guilford County. No. 94 CRS 63378, 94 CRS 63379. Appeal by the State from order entered 5 May 1995 by Judge Catherine C. Eagles in Guilford County Superior Court.

DISPOSITION: Reversed and remanded.

COUNSEL: Attorney General Michael F. Easley, by Assistant Attorney General Christopher E. Allen, for the State.

James H. Price, III, Attorney at Law, Greenville, SC, and Charles L. Morgan, Jr., Attorney at Law, Charlotte, NC, for defendant-appellee.

JUDGES: MARTIN, John C., Judge. Chief Judge ARNOLD concurs. Judge SMITH dissents.

OPINIONBY: MARTIN

OPINION: MARTIN, John C., Judge.

The State of North Carolina appeals from an order of the trial court dismissing criminal charges against defendant,

Franklin Ballenger, for violation of the North Carolina Controlled Substances Act, G.S. Section 90-86 et seq. (1993). The facts of this case are undisputed and are as follows: On 15 September 1994, defendant was found in possession of two pounds of marijuana in Guilford County, North Carolina. He was arrested and charged with felonious possession of marijuana, and possession with intent to sell or deliver marijuana, in violation of G.S. Section 90-95(a). Pursuant to G.S. Section 105-113.105 et seq. (1992), the North Carolina Controlled Substance Tax, the North Carolina Department of Revenue issued a controlled substance tax assessment against defendant.

Defendant paid the tax assessment in the full amount of $ 3,837.24, including tax, interest, and penalty, on 19 April 1995. Defendant moved to dismiss the criminal charges for possession of the controlled substances, alleging that his criminal prosecution would violate the prohibition against successive punishments for the same offense contained in the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution and guaranteed under the "law of the land" clause of Article I, Section 19 of the North Carolina Constitution. The trial court granted defendant's motion, and the State appeals pursuant to G.S. Section 15A-1445(a)(1).

"The Double Jeopardy Clause protects against (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense . . . ." State v. Gardner, 315 N.C. 444, 451, 340 S.E.2d 701, 707 (1986) (citations omitted). The "law of the land" clause incorporates similar protections under the North Carolina Constitution. See N.C. Const. art. I, Section 19. In this case, the issue is whether the assessment and collection of the North Carolina Controlled Substance Tax pursuant to G.S. Section

105-113.105 et seq., constitutes punishment so as to bar the subsequent prosecution and punishment of defendant for criminal possession of the same drugs. For the following reasons, we conclude that it does not and we reverse the trial court's dismissal of the criminal charges.

The trial court expressly based its order upon the decision of the United States Supreme Court in Montana Dept. of Rev. v. Kurth Ranch, 511 U.S. 767, 128 L. Ed. 2d 767, 114 S. Ct. 1937 (1994), a case in which the Court subjected Montana's tax statute imposing a tax on the possession and storage of dangerous drugs to double jeopardy analysis. The Supreme Court held that Montana's assessment of the tax on the possession of illegal drugs in a separate proceeding after the State had imposed a criminal penalty arising from the same conduct amounted to "a second punishment within the contemplation of [the Double Jeopardy Clause . . . .]" Kurth Ranch, 511 U.S. at , 128 L. Ed. 2d at 782 (citations omitted).

In Kurth Ranch, Montana law enforcement officials raided a farm operated by members of the Kurth family and found marijuana plants and other contraband, all of which was confiscated and presumably destroyed. In a state criminal proceeding, the Kurths pled guilty to state drug charges and were sentenced for the offenses. In a separate proceeding, the Montana Department of Revenue attempted to collect from the Kurths almost $ 900,000.00 in taxes pursuant to the Montana Dangerous Drug Tax Act, Mont. Code Ann. Section 15-25-111 et seq. (1987). The Dangerous Drug Tax Act imposed "a tax 'on the possession and storage of dangerous drugs'", and was "to be 'collected only after any state or federal fines or forfeitures [had] been satisfied.'" Kurth Ranch 511 U.S. at , 128 L. Ed. 2d at 773, (quoting Mont. Code Ann. Sections 15-25-111(1) and 15-25-111(3)). The tax was either ten percent of the assessed market value of the drugs as determined by the Montana Department of

Revenue or a specified amount per ounce depending on the drug, (for example, $ 100.00 per ounce for marijuana, and $ 250.00 per ounce for hashish), whichever was greater. Id. The Montana statute also expressly provided for the Montana Department of Revenue to adopt rules to administer and enforce the tax. Id. Under rules adopted by that Department, the taxpayer was required to file a return within seventy-two hours of his or her arrest. Id. The taxpayer, however, had no obligation to file a return or to pay any tax unless and until the taxpayer was arrested. Id. at , 128 L. Ed. 2d at 774.

The Kurths challenged the constitutionality of the Montana tax, and the lower courts invalidated the assessment as violative of the Double Jeopardy Clause. Id. at , 128 L. Ed. 2d at 774-75. The United States Supreme Court affirmed, holding that the tax violated the constitutional prohibition against successive punishments for the same offense. Id. The Court's analysis centered upon whether the Montana tax had "punitive characteristics that subject it to the constraints of the Double Jeopardy Clause." Id. at , 128 L. Ed. 2d at 778.

The Supreme Court noted "that neither a high rate of taxation nor an obvious deterrent purpose automatically marks this tax a form of punishment," although those attributes were "consistent with a punitive character." Id. at , 128 L. Ed. 2d at 779. The Montana tax was found to be "remarkably high" - a significant part of the assessment was more than eight times the drug's market value. Id. Moreover, the Court found the Montana legislature had clearly intended the tax to deter people from possessing marijuana. Id. However, the Court concentrated on two "unusual features" of the Montana statute which set it apart from most taxes and which the Court found pivotal in holding that the tax was punitive and therefore, violative of the Double Jeopardy Clause. Id. at , 128 L. Ed. 2d at 779-81.

The first "unusual feature" which concerned the Court was that the so-called tax was conditioned upon the commission of a crime. The Court viewed this condition as "significant of penal and prohibitory intent rather than the gathering of revenue." Id. at , 128 L. Ed. 2d at 779-80. Further, the Court noted that it had relied on the absence of such a condition to uphold a federal marijuana tax on the grounds that that tax was a civil rather than criminal sanction because the tax was not contingent upon the taxpayer's criminal conduct. Id. at , 128 L. Ed. 2d at 780, (citing U.S. v. Sanchez, 340 U.S. 42, 95 L. Ed. 47, 71 S. Ct. 108 (1950)). Significantly, the Court stated that:

> in this case, the tax assessment not only hinges on the commission of a crime, it also is exacted only after the taxpayer has been arrested for the precise conduct that gives rise to the tax obligation in this first place. Persons who have been arrested for possessing marijuana constitute the entire class of taxpayers subject to the Montana tax.

Id.

A second "unusual feature" of concern to the Court was the fact that, although the Montana statute characterized the tax imposed as a property tax, i.e., that is, a tax on the possession and storage of dangerous drugs, it was actually levied on goods the taxpayer neither owned nor possessed when imposed. Id. at , 128 L. Ed. 2d at 780-81. Because the tax was not assessed until and unless a taxpayer was arrested, the drugs presumably were already destroyed or no longer possessed when the tax was imposed. Id. at , 128 L. Ed. 2d at 781. The Court found this type of tax, "imposed on criminals and no others," as departing "so far from normal revenue laws as to become a form of punishment." Id. In summary, the Court concluded that "taken as a whole, this drug tax is a concoction of anomalies, too far-removed in

crucial respects from a standard tax assessment to escape characterization as punishment for the purpose of Double Jeopardy analysis." Id.

The North Carolina Controlled Substance Tax, G.S. Section 105-113.105 et seq., as it was in effect at all times pertinent to this case, however, contains neither of the "unusual features" upon which the Supreme Court relied in Kurth Ranch to conclude that Montana's dangerous drug tax constituted punishment for double jeopardy purposes. The North Carolina Controlled Substance Tax is not predicated upon whether the taxpayer in possession of the controlled substance has been arrested or charged with criminal conduct, nor is it assessed on property that necessarily has been confiscated or destroyed. Specifically, the North Carolina Controlled Substance Tax provides that a "tax is levied on controlled substances and counterfeit controlled substances possessed by dealers . . ." at various rates depending on the type of controlled substance possessed. N.C. Gen. Stat. Section 105-113.107 (1992). A dealer is defined as:

> [a] person who in violation of G.S. 90-95 possesses, delivers, sells, or manufactures more than 42.5 grams of marijuana, seven or more grams of any other controlled substance or counterfeit controlled substance that is sold by weight, or 10 or more dosage units of any other controlled substance or counterfeit controlled substance that is not sold by weight.

N.C. Gen. Stat. Section 105-113.106 (1992 & 1994 Cum. Supp.). The tax is due within forty-eight hours after the dealer possesses the substance in this State upon which the tax has not been previously paid as evidenced by a tax stamp. N.C. Gen. Stat. Section 105-113.109 (1992).

The tax obligation is not contingent upon the dealer's arrest which, in the normal course of events, would result in the confiscation and destruction of the substance. The dealer can satisfy his tax obligation by paying the tax upon acquisition of the substance and by then permanently affixing thereto stamps issued by the Secretary of Revenue to indicate payment. N.C. Gen. Stat. Section 105-113.108 (1992). So long as the stamps remain affixed, no additional tax is thereafter due even though the substance may be handled by other dealers. N.C. Gen. Stat. Section 105-113.109. Because the North Carolina tax becomes payable within forty-eight hours after the taxpayer comes into possession of the substance, it is not a tax on confiscated goods, as was the case with the Montana tax, which became due only upon the taxpayer's arrest for possession of the substance. To the contrary, the dealer is not required, when paying the tax, to disclose his or her identity, G.S. Section 105-113.108, and any information obtained pursuant to this statute is confidential and cannot be used in a criminal prosecution other than a prosecution for failure to comply with the tax statute itself. N.C. Gen. Stat. Section 105-113.112 (1992 & 1994 Cum. Supp.).

While we do not pretend to ignore that the high rate of taxation provided by the statute is intended to have a deterrent effect, "these features, [a high tax rate and a deterrent purpose,] in and of themselves, do not necessarily render the tax punitive . . . ." Kurth Ranch, 511 U.S. at , 128 L. Ed. 2d at 779 (citation omitted).

In our view, the North Carolina statute is a legitimate and remedial effort to recover revenue from those persons who would otherwise escape taxation when engaging in the highly profitable, but illicit and sometimes deadly activity of possessing, delivering, selling or manufacturing large quantities of controlled drugs. The General Assembly has expressly stated its purpose in enacting the tax as:

> The purpose of this Article is to levy an excise tax on persons who possess controlled substances and counterfeit controlled substances in violation of North Carolina law and to provide that a person who possesses such substances in violation of this Article is guilty of a felony. Nothing in this Article may in any manner provide immunity from criminal prosecution for a person who possesses an illegal substance.

N.C. Gen. Stat. Section 105-113.105 (1992); see also N.C. Gen. Stat. Section 105-113.105 (1995) (statute's purpose reworded to read, in pertinent part: "The purpose of this Article is to levy an excise tax to generate revenue for State and local law enforcement agencies and for the General Fund").

We hold that the North Carolina Controlled Substance Tax does not have such fundamentally punitive characteristics as to render it violative of the prohibition against multiple punishments for the same offense contained in the Double Jeopardy Clause. Therefore, the trial court erred in concluding that prosecution of defendant on the drug possession charges would subject him to double jeopardy in violation of the United States and North Carolina Constitutions. The order of the trial court is reversed, and this case is remanded for further proceedings in the trial division.

Reversed and remanded.

Chief Judge ARNOLD concurs.

Judge SMITH dissents.

DISSENTBY: SMITH

DISSENT: SMITH, Judge dissenting.

I respectfully dissent from the majority's opinion which reverses the trial court and remands.

Initially, it should be noted that this Court's analysis is based upon Chapter 105, Article 2D of the North Carolina General Statutes as it existed on 15 September 1994, the date on which Mr. Ballenger possessed the drugs. Subsequent changes were made to the statute by amendments. Such changes could render my analysis or that of the majority incorrect for cases arising after such changes. However, since the tax was assessed prior to the amendments, we do not address those provisions in the 1995 statute which were added or amended.

In its Kurth Ranch opinion, the United States Supreme Court did not hold that in order to find a tax violative of the Double Jeopardy Clause, the tax must contain each of the punishment aspects in the Montana Dangerous Drug Tax. Rather, the Court held that "taken as a whole, [the Montana] drug tax is a concoction of anomalies, too far-removed in crucial respects from a standard tax assessment to escape characterization as punishment for the purpose of Double Jeopardy analysis." Montana Dept. of Rev. v. Kurth Ranch, 511 U.S. 767, , 128 L. Ed. 2d 767, 781, 114 S. Ct. 1937 (1994). Violation of the Double Jeopardy Clause "can be identified only by assessing the character of the actual sanctions imposed on the individual by the machinery of the state." United States v. Halper, 490 U.S. 435, 447, 104 L. Ed. 2d 487, 501, 109 S. Ct. 1892 (1989). In Kurth Ranch, the Court followed an analysis similar to that set out in Halper, looking at the application of the assessment imposed by Montana and holding that it was unconstitutional as applied. Similarly, analysis of the application of the North Carolina Controlled Substance Tax as applied in the instant case leads to what I believe is an

inescapable conclusion that criminal conviction following assessment of the tax is additional punishment violative of the Double Jeopardy Clause. For this reason, I dissent.

It should be recognized that the State could prosecute defendant Ballenger criminally if it had not previously punished him for the same offense through the assessment of the tax, or if it had assessed the tax in the same proceeding which resulted in his conviction. See Kurth Ranch, 511 U.S. at , 128 L. Ed. 2d at 778. The fact that defendant was criminally charged for the same conduct for which the North Carolina Controlled Substance Tax was previously assessed requires that we analyze the tax under a Double Jeopardy analysis.

The first question presented is whether a civil sanction, more specifically a tax, may constitute punishment for purposes of Double Jeopardy. The Supreme Court has held that a civil sanction may constitute punishment when "the sanction as applied in the individual case serves the goals of punishment." Halper, 490 U.S. at 448, 104 L. Ed. 2d at 501. The traditional goals of punishment include retribution and deterrence. "[A] civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can be explained only as also serving either retributive or deterrent purposes, is punishment . . . ." Id. at 448, 104 L. Ed. 2d at 502. A defendant who has already been subjected to such a sanction may not then be punished a second time through criminal prosecution. Whether an assessment is called "civil" or "criminal" or "tax" or "sanction" does not control when determining whether the assessment is violative of the Double Jeopardy Clause. See Kurth Ranch, 511 U.S. at , 128 L. Ed. 2d at 779; Halper, 490 U.S. at 447, 104 L. Ed. 2d at 501.

The United States Supreme Court, as well as the

majority in the instant case, held that neither a high rate of taxation nor an obvious deterrent purpose automatically mark a tax as a form of punishment. However, both factors, while not dispositive, are "consistent with a punitive character." Kurth Ranch, 511 U.S. at , 128 L. Ed. 2d at 779. The Supreme Court found that those factors, coupled with other "unusual factors," clearly indicated the Montana tax was a second form of punishment, violative of the Double Jeopardy Clause.

The North Carolina Controlled Substance Tax contains many of the same elements as the Montana tax found to violate Double Jeopardy in Kurth Ranch.

First, under the Montana statute some of the revenue generated by the tax is devoted to investigation, arrest and prosecution of individuals involved in distribution of drugs. Similarly, in North Carolina, seventy-five percent of the revenue raised from the tax is to be channeled to state and local law enforcement agencies responsible for investigating crimes involving controlled substances. N.C. Gen. Stat. Section 105-113.113 (1992). The Montana statute requires law enforcement officers to notify the appropriate taxing authorities when drugs are seized and the North Carolina statutes do not. While the North Carolina statute does not contain the same explicit provision, it obviously encourages the same type of notification since the involved law enforcement agency receives the "lion's share" of any tax collected.

Second, the North Carolina assessment is clearly penal in nature. The statute fails to meet the traditional revenue-raising purpose of a tax. Rather, the preamble provides that the purpose of the tax "is to levy an excise tax on persons who possess controlled substances and counterfeit controlled substances in violation of North Carolina law and to provide that a person who possesses such substances in

violation of this Article is guilty of a felony." N.C. Gen. Stat. Section 105-113.105 (1992). Obviously, the intent of the legislature was to impose an additional penalty upon persons who violate the North Carolina criminal drug possession laws. (Added evidence of the legislature's intent is a 1995 amendment providing an exemption to the tax to those persons in lawful possession of a controlled substance. N.C. Gen. Stat. Section 105-113.107A (1995).)

Furthermore, like the Montana tax, the North Carolina tax on marijuana is extremely high at almost $ 100.00 per ounce. N.C. Gen. Stat. Section 105-113.107 (1992). The tax is payable within 48 hours after a dealer acquires possession of a non-tax-paid controlled substance. If not paid within that time period, the possessor is subjected to a one hundred percent penalty fee and is guilty of a Class I felony. N.C. Gen. Stat. Sections 105-113.109 and -113.110 (1992).

Pursuant to a 1995 amendment, a possessor is now subjected to interest and a penalty of fifty percent of the tax. N.C. Gen. Stat. Section 105-113.110A (1995).) Finally, the record reflects that the State has offered no evidence that the amount of the tax correlates in any way with the societal or remedial costs suffered by the State as a result of the taxed activities. These factors considered together are "consistent with a punitive character." Id. at , 128 L. Ed. 2d at 779.

Third, like the Montana tax, the North Carolina tax is conditioned on commission of a crime. The North Carolina tax is levied against a dealer who possesses more than 42.5 grams of marijuana, seven or more grams of any other controlled substance that is sold by weight, or 10 or more dosage units of any other controlled substance that is not sold by weight. N.C. Gen. Stat. Section 105-113.106 (1992). Therefore, the only people subject to the tax are those who, by definition, engage or have engaged in criminal conduct.

See N.C. Gen. Stat. Section 90-95 (1993).

Fourth, like the Montana tax, the North Carolina tax allows assessment of the tax after confiscation or seizure of the controlled substances upon which the assessment is made. Unlike the Montana tax, the North Carolina assessment may also occur prior to or without an arrest, as it is due 48 hours after the dealer possesses the controlled substance. The fact that a person may be assessed a tax on a substance that he neither owns or possesses when the tax is imposed is further evidence of the punitive nature of the tax. The State argues that, since the Montana tax was a "property" tax, while the North Carolina tax is labeled an "excise" tax, this somehow makes a difference in this analysis. However, the State offers no rationale as to why that would affect the tax's punitive character and I can perceive of none. The North Carolina tax and the Montana tax are both assessed upon persons who are in possession of a controlled substance covered by the tax statute.

Also, while the Montana tax expressly provided that the tax was to be collected only after state or federal fines or forfeitures had been satisfied, Kurth Ranch, 511 U.S. at , 128 L. Ed. 2d at 773, the North Carolina tax has no such comparable provision. The North Carolina tax presumably may be assessed and collected before any existent state or federal fines or forfeitures. In my opinion, this is yet another indication of the punitive nature of the North Carolina Controlled Substance tax.

Fifth, as the Supreme Court recognized, taxes upon illegal activities differ from mixed-motive taxes which a state may impose both to deter a disfavored activity and to raise money, such as cigarette and liquor taxes. By imposing such taxes, the State seeks to discourage certain activities. However, because the products provide benefits such as additional employment, consumer satisfaction and increased

tax revenues, the government allows the manufacture, sale and use of those items so long as manufacturers, sellers and consumers pay high taxes that reduce consumption. These justifications disappear when a tax is imposed upon an activity which is completely prohibited by the same sovereign which taxes the activity. "The legitimate revenue-raising purpose that might support such a tax could be equally well served by increasing the fine imposed upon conviction." Kurth Ranch, 511 U.S. at , 128 L. Ed. 2d at 780.

Like the Montana tax, the North Carolina Controlled Substance tax is unusual in that it contains punitive as well as tax characteristics. In my view, the North Carolina tax, [**578] taken as a whole, is significantly similar to the Montana tax which was found to be violative of Double Jeopardy in Kurth Ranch. Like that tax, the North Carolina tax assessed against Mr. Ballenger is a "concoction of anomalies, too far-removed in crucial respects from a standard tax assessment to escape characterization as punishment for the purpose of Double Jeopardy analysis." Id. at , 128 L. Ed. 2d at 781. For these reasons I would affirm the ruling of the able trial judge.

STATE OF NORTH CAROLINA
GUILFORD COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

94 CrS 63378
94 CrS 63379

STATE OF NORTH CAROLINA
v.
FRANKLIN BALLENGER

This matter came before the undersigned judge presiding at the May 1, 1995, term of Court on the defendant's Motion to Quash/Dismiss filed April 24, 1995. Present were the defendant, Assistant District Attorney Stephen W. Cole and J.H. Price, III, attorney for the defendant.

The court makes the following Findings of Fact, which appear as of record and are without dispute:

1. Defendant Franklin Ballenger was arrested on September 15, 1994, in Guilford County and charged with two criminal offenses, 94 CrS 63378 and CrS 63379, as a result of two pounds of marijuana being found in the trunk of the vehicle in which he was traveling.

2. The North Carolina Department of Revenue served a Certificate of Tax Liability, Notice of Controlled Tax Assessment, and Warrant for Collection of Taxes on Mr. Ballenger pursuant to N.C.G.S. Section 105-113.105 et. seq., whereby the Department sought taxes, interest, and penalties as a result of Mr. Ballenger's possession of the identical two pounds of marijuana giving rise to the criminal charges herein.

3. Mr. Ballenger paid the North Carolina tax, interest, and penalty on April 19, 1995, in the amount of $3837.24.

Based on these findings of fact, the Court concludes as a matter of law that:

1. This case is governed by the law set forth in Department of Revenue of Montana v. Kurth Ranch, 114 S.Ct. 1937 (1994), in which the U.S. Supreme Court held that a person previously convicted of drug charges could not be required to pay the applicable Montana drug tax on the same property, plus interest and penalties, because such a result would violate the Double Jeopardy clause of the United States Constitution.

2. The North Carolina drug tax statute is substantially similar to the Montana statute.

3. The defendant has already been punished under the laws of North Carolina for possession of the two pounds of marijuana on September 15, 1994, by virtue of the assessment of the tax, interest and penalties and his payment thereof.

4. To allow criminal prosecution of the defendant in these pending cases would violate his rights under the Fifth Amendment of the United States Constitution.

NOW THEREFORE, the Court ORDERS that 94 CrS 63378 and CrS 63379 be and hereby are DISMISSED. Entered in open court this 2nd day of May and signed this 5 day of May.

/s/
Catherine C. Eagles
Superior Court Judge Presiding